No. 17-6086

In The
Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation to the Attorney General in 34 U.S.C. § 20913(d) violates the constitutional nondelegation doctrine.

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is the national law firm for liberty, litigating in state and federal courts nationwide in defense of private property rights, educational choice, economic liberty, and free speech. The Institute advocates for adherence to the Constitution's constraints on the size and scope of government powers, which are crucial to the preservation of individual liberty. Many of the Institute's past or current clients are subject to federal regulations promulgated under congressional delegations. Some of these clients face or have faced criminal penalties for alleged violations of federal regulations. For these reasons, the Institute for Justice has an interest in the enforcement of the Constitution's separation of powers.

SUMMARY OF THE ARGUMENT

In every high school civics class in America, students learn that in our government's system of checks-and-balances, "the legislature makes [the law], the executive executes [the law], and the judiciary construes the law." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). It's a simple description, but it matches the basic tripartite structure in our Constitution and would be familiar to the founding generation.

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this *amicus* brief. No portion of this brief was authored by counsel for any party, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

Unfortunately, it bears no resemblance to the modern Federal Government. Today, the Executive Branch routinely makes the law, enforces the law, and interprets the law—and even adjudicates many of its own cases.

This case is not about if, when, or how convicted sex offenders should register with law enforcement—all very serious questions which *Congress* has good reason to address. This case is about something more fundamental: "[p]ower" and the "equilibrium the Constitution sought to establish" with our tripartite system of government. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). And this case presents the Court with an opportunity to restore the legislative power to the correct branch.

In Section I, *amicus* argues that the nondelegation doctrine derived from the Vesting Clauses is treated as dead letter by federal courts, and the result is the concentration of lawmaking and law enforcement in the Executive Branch. From 1940 to 2015, the period of the modern intelligible principle test, a study reveals **0.06 percent** of nondelegation challenges prevailed in federal courts. Compare that to the **12 percent** of federal nondelegation challenges that prevailed *before* the Court adopted the modern intelligible principle test. Or compare it to the **16 percent** of state nondelegation challenges that prevailed in the same period, 1940-2015. The 12 and 16 percent success rates are comparable to the success rates of constitutional claims under the Free Speech Clause, Free Exercise Clause, and Fourth Amendment exclusionary rule.

Now, the Executive Branch makes much more law than the Legislative Branch, thanks to broad and unchecked congressional delegations that outsource lawmaking to the President and independent federal agencies. In 2016, federal agencies promulgated almost **100,000 pages** of federal rules in the Federal Register, **about 17 times** as many pages as the roughly **6,000 pages** of statutory law enacted during the 114th Congress. Today, the Code of Federal Regulations (C.F.R.) includes **one million** regulatory mandates or prohibitions, and imposes over **one trillion** dollars in costs.

It is particularly troubling that Congress often outsources to the Executive Branch the job of deciding what conduct to criminalize (including delegations directly to the Nation's prosecutors, as in this case). There are **300,000** or more regulatory crimes scattered throughout the C.F.R., **67 times** as many crimes as the about **4,500** federal statutory crimes. Some of these regulatory crimes are seriously absurd, like the criminalization of misshaped meatloaf or mislabeled marbles. Others address serious subjects, like the Sex Offender Registration and Notification Act ("SORNA") regulation at issue here. But the serious problem is that the Executive Branch, not the Legislative Branch, is deciding what conduct to punish.

In Section II, *amicus* argues that even if the delegation at issue here is the rare example of a delegation impermissible even under the intelligible principle test, as Petitioner persuasively argues, it is nonetheless time for the Court to sever ties with that test. The

modern intelligible principle test is utterly divorced from the Constitution's text, structure, and history. This Court should adopt a more originalist nondelegation test that would return lawmaking to where it belongs.

Because the Second Circuit's decision in *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010), on which the lower Court's decision relied, *see* Petitioner's Brief at 14, rests on a flawed application of the Vesting Clauses, this Court should reverse.

ARGUMENT

The "nondelegation doctrine"—the principle that Congress may not outsource its exclusively legislative powers to any other Branch or to private parties—comes from the Constitution's opening declaration that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. *See also Mistretta v. United States*, 488 U.S. 361, 371 (1989) (the nondelegation doctrine derives from Article I's vesting of legislative power in Congress). Congress's Vesting Clause does not say "some," or "much," or "most" legislative powers are vested in Congress. It says "all" legislative powers are vested in Congress—and Congress alone.

Yet we "have come to a strange place in our separation-of-powers jurisprudence." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring). Today, federal agencies, not

Congress, create most new federal law. The Executive Branch routinely regulates—and even more troubling, *criminalizes*—garden-variety private conduct. This new order threatens the individual liberties our Constitution is designed to protect. To help restore the separation of powers, the Court should adopt an originalist nondelegation test.

I. Federal Courts Have Abandoned the Nondelegation Doctrine, and Significant Lawmaking Power is Now Concentrated in the Executive Branch

The principle that "Congress cannot delegate the legislative power" is "vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). But the modern intelligible principle test has erased that vital principle from this Court's jurisprudence.

Since 1935, no public nondelegation challenge has prevailed at the Supreme Court under the modern "intelligible principle test." This highly-permissive test gives Congress a green light to freely delegate away its exclusive power to regulate private conduct. The result is the "gradual concentration" of Congress's exclusive lawmaking power into the Executive Branch. James Madison, Federalist No. 51. The President now makes more law than Congress—by an order of several magnitudes—and regulatory agencies have promulgated hundreds of thousands of federal criminal offenses.

Even if any particular regulation could be defended as a permissible delegation, in the aggregate, the sheer scope of modern regulatory law would be incomprehensible to the founding generation. It is particularly troubling that the making of criminal law is now concentrated in the Executive Branch. *See United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("the power of punishment is vested in the legislative" branch, "which is to define a crime, and ordain its punishment"). These regulations pose a serious threat to individual liberty.

A. The Modern Intelligible Principle Test Allows the Executive Branch to Make Law and Decide Policy

In 1825, this Court recognized that the Vesting Clauses prohibit Congress from delegating away enumerated "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). This "nondelegation principle" is rooted in Article I, § 1 of the U.S. Constitution, which vests Congress with "[a]ll legislative Powers herein granted." *Amicus* discusses the original understanding of this provision in greater detail *infra* at Section II.

For more than a century after the Court decided *Wayman*, various federal courts held a number of delegations violated the Constitution's separation of powers. Between 1880 and 1940—during the initial expansion of the administrative state—12 percent of federal nondelegation challenges prevailed. Keith E.

Whittington and Jason Iuliano *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 426 (2017). That figure suggests that federal courts took the nondelegation doctrine seriously[2]—but also that, consistent with Chief Justice John Marshall's caution in *Wayman*, federal courts do not appear to have "enter[ed] unnecessarily" into nondelegation disputes. *Wayman* at 46. The success rate of nondelegation claims in this period resembles the success rate of other constitutional claims, such as religious liberty claims under the Free Speech Clause (14 percent success rate) or under the Free Exercise Clause (20 percent success rate). *See* Luke W. Goodrich and Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 382 (2018). And it resembles the success rate of Fourth Amendment exclusionary rule claims (11.62 percent of suppression motions result in acquittals). *See* Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. Pa. L. Rev. 1709, 1728 (2005).

The most prominent example of a successful nondelegation challenge is probably *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935),

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[2] The study's authors draw a different conclusion from the raw numbers: that a 12 percent success rate shows the nondelegation doctrine was "already dead" before 1940, *id.* at 431. A 12 percent success rate does not support this conclusion, given the comparable success rates in other constitutional claims discussed above. But the 0.06 percent success rate under the modern intelligible principle test is definitely "dead."

discussed in greater detail *infra* at Section I(D)(3). But then, in a series of cases in the 1940s, the Court adopted a new nondelegation test, even though it ostensibly invoked the "intelligible principle" test from an earlier case, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). Under the new version of the test, Congress may delegate its lawmaking powers to an agency so long as Congress suggests an "intelligible principle" to guide the agency's lawmaking—with the added wrinkle that a statute is sufficiently "intelligible" if Congress sets the "general policy" direction for the agency to pursue. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (finding no impermissible delegation where Congress authorized the SEC to prohibit reorganizations that "unfairly or inequitably" distribute voting power).

Applying the modern intelligible principle test, this Court has held, for example, that Congress can delegate to an agency the power to fix prices at a level that the agency finds "fair and equitable," *Yakus v. United States*, 321 U.S. 414, 427 (1944); to decide what utility charges are "just and reasonable," *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944); or regulate public broadcasting in a manner that is "in the public interest." *National Broadcasting Co. v. United States*, 319 U.S. 190, 224-225 (1943).

"Fair," "just," and "public interest" are all "intelligible" terms—in the sense that those words, to some degree, are "capable of being understood." Webster's Dictionary (Second Edition) (1938). But they're also capable of being misunderstood, or even manipulated.

And they grant broad policymaking authority that is "too great . . . to be called anything other than legislative." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (cleaned up) (arguing that a principle can be both "intelligible" and yet still legislative).

The *National Broadcasting Co.* case shows just how legislative in character "public interest" rulemakings can be. As of at least 2001, Congress had authorized the FCC to act in the "public interest" in close to a hundred statutory provisions—so many times that the FCC now couches much if not most of its regulations and enforcement in the public interest rubric. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 Fed. Comm. L.J. 427, 429 (2001). The FCC has invoked the standard to encourage some political programming, to discourage programming involving drugs or sex, to transform the ownership structure of TV, cable, newspaper, and wireless companies, and to interfere with mergers—to name a few. *Id.* at 429-430. And in 2015, the FCC invoked the "public interest" to justify much of its controversial Open Internet Order, which reclassified the Internet under Title II of the Act as a communications service subject to significantly greater government oversight. *See* Protecting and Promoting the Open Internet, 80 F.R. 19738 (Apr. 13, 2015) (referencing the "public interest" over 100 times in final rule).

B. Although Federal Courts now Treat the Nondelegation Doctrine as a Dead Letter, Data Show Federal Courts Routinely Enforced Nondelegation For a Century, and State Courts Still Do

The modern intelligible principle test did not weaken the nondelegation doctrine—it erased it. Between 1940 and 2015 the effective success rate for all federal nondelegation challenges in the federal appellate courts and U.S. Supreme Court had fallen to a remarkable **0.06 percent**. Jason Iuliano and Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L. Rev. 619, 636 (2018) (only five of 156 nondelegation challenges prevailed in federal appellate courts; of those five decisions, four were reversed). And this Court has not held that a statute impermissibly delegated legislative power to the Executive Branch since 1935, when the Court decided *Schechter Poultry*, discussed *infra* at Section I(D)(3).

The experience of state courts applying their own nondelegation doctrines during the same period provides a stark contrast. From 1940 through 2015, nondelegation challenges prevailed in 151 out of 919 state court cases—an invalidation rate of 16 percent. Iuliano and Whittington at 636. That percentage is roughly comparable to the average success rate of 20 percent for all constitutional challenges in state courts. *Id.* at 637.

Florida is illustrative. Like the federal Constitution, the Florida Constitution establishes a similar

tripartite system, with each branch's powers limited to those enumerated "herein." Fla. Const., art. II, § 3 ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein"). But unlike the federal Constitution, state courts continue to enforce the Florida Constitution's separation of powers. *See* A. J. Kritkos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 Mo. L. Rev. 441 (2017) (describing the Florida experience enforcing the nondelegation doctrine).

For example, in *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978), the court held that an environmental statute authorizing a state agency to designate "areas of critical state concern" was impermissible because it ceded to an agency the core legislative power to determine what "concerns" are "critical" to the state. *Id.* at 925. The Florida Supreme Court expressly rejected the federal intelligible principle test, which the court described as "abandon[ing] the doctrine of nondelegation." *Id.* at 924. The court also rejected the argument that the "complexities of modern society" require the legislature to repose in an agency "the power to establish fundamental policy." *Id.* Instead, the court ruled that if legislation is "so lacking in guidelines" that it empowers the agency to become "the lawgiver rather than the administrator," it is unconstitutional. *Id.* at 918-919.

The experience of Florida and other states suggests that greater enforcement of constitutional nondelegation is judicially administrable. Whatever the

"correct" success rate for federal nondelegation challenges might be, it should be greater than zero. That the success rate under the current test is effectively zero suggests that the current test is incompatible with what the Constitution demands.

C. Lawmaking by Regulatory Bodies Now Outpaces Lawmaking by Congress, and Over One Million 'Regulatory Restrictions' Impose Over a Trillion Dollars in Annual Costs

Relying on broad delegations of authority, the President now routinely sets policy and makes law on important subjects and routinely regulates private conduct. Indeed, the President now makes more law than Congress. During the 114th Congress (2015-2016), Congress enacted 6,170 pages of law. *See* Brookings Institution's Vital Statistics, *Congressional Workload, 30th-114th Congresses, 1947-2016*, Table 6-4, https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch6_full.pdf. In stark contrast, in 2016, federal agencies promulgated 97,069 pages of federal rules in the condensed, tri-column format of the Federal Register. *Id.* at Table 6-5.

That gulf between the amount of lawmaking done by Congress and the amount of lawmaking done by federal agencies has not always been so immense. The 81st Congress (1949-1950) enacted 2,314 pages of public laws, *see* Brookings Institution's Vital Statistics at Table 6-4, and the same year, federal agencies

promulgated 9,562 pages of regulations, *see* Federal Register Pages Published 1936-2017, FederalRegister.gov, https://www.federalregister.gov/uploads/2018/03/pagesPublished2017.pdf.

The total size of the C.F.R. has grown at an immense rate. Between 1950 and 2016, the total pages of federal regulatory law grew by 1,890 percent. *See* Code of Federal Regulations Total Pages and Volumes 1938-2017, FederalRegister.gov, https://www.federalregister.gov/uploads/2018/03/cfrTotalPages2017.pdf (showing 9,745 pages in the C.F.R. in 1950 and 185,053 pages in the C.F.R. in 2016).

Nor are these pages of regulations merely hortatory. One quantitative study shows that the number of "regulatory restrictions"—the researchers' term to describe phrases like "*shall*" or "*must*" or other words that require or prohibit activity—in the C.F.R. has steadily increased by about 13,000 restrictions per year. By the end of 2016, the C.F.R. included at least 1,080,000 total regulatory restrictions. *See* Patrick McLaughlin and Oliver Sherhouse, *Regulatory Accumulation since 1970*, George Mason University Mercatus Center, https://quantgov.org/charts/regulatory-accumulation-since-1970/. These "regulatory restrictions" impose an estimated $1.96 trillion (that's with a *t*) in costs on the U.S. economy each year. *See* Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State, 2017 Edition*, Competitive Enterprise Institute, 2-3 (2017), https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf.

And often, federal agencies regulate on important, controversial topics precisely because Congress has *not* adopted the policies the agencies prefer, such as the EPA's Clean Power Plan or the FCC's Open Internet Order. *See* Ilan Wurman, *Constitutional Administration*, 69 Stan. L. Rev. 359, 371 fn. 53 (2017) (describing some of the "recent controversial" rulemakings as "involve[ing] important political issues" Congress debated but had not acted on).

D. Congressional Delegations Have Resulted in Over 300,000 Regulatory Crimes, Criminalizing Everything from Mislabeled Marbles to Misshaped Meatloaf

Regulatory criminalization provides a good example of how widespread legislative delegation endangers individual liberty. There are so many federal crimes today that "scholars actually debate their numbers." *United States v. Baldwin*, 745 F.3d 1027, 1031 (10th Cir. 2014) (citing John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991)). After the Department of Justice assigned Ronald Gainer to count all federal criminal laws in 1982, he had to give up because "[y]ou will have died and resurrected three times" before counting them all. Gary Fields and John R. Emshwiller, *Many Efforts to Count Nation's Federal Criminal Laws*, Wall Street Journal, Jul. 23, 2011, https://www.wsj.com/articles/SB10001424052702304319804576389601 07

9728920. The best estimates suggest that with at least 300,000 regulatory crimes in the C.F.R, there are 67 times as many federal regulatory crimes as the 4,450 statutory crimes in the U.S. Code. *Baldwin*, 745 F.3d at 1031 (citing estimate of 300,000 regulatory crimes) and John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation (2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes (estimating 4,450 federal statutory crimes).

1. The abundance of federal criminal law is a recent phenomenon.

"Before the Civil War, Congress enacted very few criminal laws and crime control was left largely to the states." *United States v. Matchett*, 837 F.3d 1118, 1119 (11th Cir. 2016) (cleaned up). The few federal crimes addressed "injury to or interference with the federal government itself or its programs" or crimes against individuals that occurred on federal lands or waters. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 Annals Am. Acad. Pol. & Soc. Sci. 39, 40 (1996).

For example, the first federal criminal code—adopted by the Congress in 1790—only covered seven categories of offenses against the United States itself or offenses on federal lands, waters, or the high sea: treason (including misprision of treason), piracy, murder and mayhem, larceny, offenses against the judicial tribunal (such as perjury, bribery of judges,

obstruction, theft of executed bodies, and prison breaks), offenses against diplomats, and counterfeiting. *See* Crimes Act of 1790, ch. 9, 1 Stat. 112.

Since the New Deal—and in particular, since the 1970s—the number of federal criminal statutory laws has increased significantly. But whatever broader concerns may exist about the federalization of criminal law, *see, e.g.*, *Task Force on the Federalization of Criminal Law*, American Bar Association, The Federalization of Criminal Law (1998), federal *statutory* crimes are, at least, enacted by the body the Constitution entrusted with the legislative power. *Wiltberger*, 18 U.S. (5 Wheat.) at 95 (describing criminalization as the province of the Legislative Branch). *See also United States v. Evans*, 333 U.S. 483, 486 (1948). But statutory crimes adopted by Congress constitute only a tiny fraction of all federal criminal offenses today.

2. Examples from the 300,000 regulatory crimes show agencies criminalize harmless, garden-variety private conduct

Today, Congress "freely delegate[s] the core legislative business of writing criminal offenses to unelected" bureaucrats. *Baldwin*, 745 F.3d at 1030. As a result, the Code of Federal Regulations (C.F.R.) is now "crowded" with regulatory crimes because of "generous congressional delegations" of authority. *Id.* at 1031. One estimate from 1990 pegged the number of regulatory crimes at 300,000. *Id.* Thirty years later, the

number is likely much greater. Compare the 300,000 regulatory crimes with the roughly 4,450 statutory crimes in the U.S. code. John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation (2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

It's not always obvious what regulatory violations carry criminal penalties. Indeed, "[n]ormally we don't think of regulatory agencies as entitled to announce new crimes by fiat," so understanding whether regulatory noncompliance triggers criminal penalties requires "some scratching around." *Baldwin*, 745 F.3d at 1030. Often, it's necessary to read through several statutory provisions and several regulations.

The popular @CrimeADay Twitter account, which has reported one federal crime a day for nearly four years, provides a revealing glimpse into the broad and bewildering world of regulatory crimes. *See* @CrimeADay, Twitter (Jul. 17, 2015), https://twitter.com/CrimeADay/status/622073623013146624 (estimating it will take 800 years to tweet one federal crime per day).

Take 40 U.S.C. § 1315, which authorizes "unelected property managers" to write regulations to protect and administer federal property. *Baldwin*, 745 F.3d at 1030-1031 (expressing reservations about regulatory criminalization while upholding conviction for refusal to give officer license and registration). The objective of the statute's delegation, protecting federal

property, is reasonable enough. But what measures are reasonable for the protection of federal property is tougher to answer. The danger with such a broad delegation is, as the Framers well understood, that the "avidity to punish . . . leads men to stretch, to misinterpret, and to misapply even the best of laws." Thomas Paine, *Dissertation on First Principles of Government*, The Complete Writings of Thomas Paine 588 (Philip S. Foner ed., The Citadel Press 1945) (1795).

How reasonable are these protections of federal property? Federal regulations issued under 40 U.S.C. § 1315 make it a crime to fall asleep at the U.S. Meat Animal Research Center in Clayton, Nebraska, *see* 40 U.S.C. § 1315(c), 7 C.F.R. § 501.5, and 7 C.F.R. § 500.15[3] or to collect on a private debt while in the National Arboretum *see* 40 U.S.C. § 1315(c), 7 C.F.R. § 500.8(a)(3), and 7 C.F.R. § 500.15.[4] And when at the National Institutes of Health, don't ride a bicycle without a horn, *see* 40 U.S.C. § 1315, 45 C.F.R. § 3.27, and 45 C.F.R § 3.3.[5] And don't engage in any hobbies outside designated areas, *see* 40 U.S.C. § 1315(c), 45 C.F.R. § 3.42(a), and 45 C.F.R § 3.3,[6] or go rollerskating, 40 U.S.C. § 1315(c)(2),

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[3] @CrimeADay, Twitter (Jun. 10, 2015), https://twitter.com/CrimeADay/status/608826503678316544.

[4] @CrimeADay, Twitter (Aug. 8, 2017), https://twitter.com/CrimeADay/status/895097729025589248.

[5] @CrimeADay, Twitter (Nov. 14, 2015), https://twitter.com/CrimeADay/status/665719787599872000.

[6] @CrimeADay, Twitter (Jun. 15, 2015), https://twitter.com/CrimeADay/status/610626593996828672.

45 C.F.R. § 3.42(e), and 45 C.F.R § 3.3.[7] Those are crimes, too.

One need not visit federal property to risk an amusement-related criminal offense. According to the Consumer Product Safety Commission ("CPSC"), it's a criminal offense to sell classic toys like lawn darts, *see* 15 U.S.C. §§ 1261, 1262, 1263, 1264 and 16 C.F.R. § 1500.18(a)(4),[8] and toy clackers *see* 15 U.S.C. §§ 1261, 1262, 1263, 1264 and 16 C.F.R. § 1500.18(a)(7).[9] And CPSC says it's a crime to sell a toy marble without an explicit warning that the toy marble is a toy marble, *see* 15 U.S.C. §§ 1261, 1262, 1263, 1264 and 16 C.F.R. § 1500.19(b)(4)(i).[10] And that warning better include an exclamation mark inside an "equilateral" triangle—no isosceles or right triangles allowed—or that's a crime, too, 15 U.S.C. § 1264 and 16 C.F.R. § 1500.19(d)(11).[11]

Federal regulators care a lot about shapes when it comes to the dizzying array of food crimes, too. Under regulations by the Food and Drug Administration ("FDA"), the unwary pasta seller might face federal criminal sanctions for selling "egg noodles" if they're

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[7] @CrimeADay, Twitter (Jul. 23, 2015), https://twitter.com/CrimeADay/status/624385604395134977.

[8] @CrimeADay, Twitter (Aug. 8, 2014), https://twitter.com/CrimeADay/status/497761129016623104.

[9] @CrimeADay, Twitter (Jun. 15, 2016), https://twitter.com/CrimeADay/status/743246979203989504.

[10] @CrimeADay, Twitter (Feb. 23, 2016), https://twitter.com/CrimeADay/status/702289127325229056.

[11] @CrimeADay, Twitter (Aug. 14, 2016), https://twitter.com/CrimeADay/status/764986590422769665.

not ribbon-shaped, *see* 21 U.S.C. §§ 331, 333, 341, 343(g) and 21 C.F.R. § 139.150(b).[12] Ditto selling soy spaghetti if it's not tube- or cord-shaped, *see* 21 U.S.C. §§ 333, 341 and 21 C.F.R. §§ 139.140 & 139.110(c).[13] The FDA is also concerned about the shape of meatloaf—if it's labeled "Old Fashioned," it better be rectangular with a rounded top, or circular with a flat bottom, or that could be a federal crime, too. *See* 21 U.S.C. § 676 and 9 C.F.R. § 301.2, 9 C.F.R. § 317.8(b)(9)(iii). And woe unto the baker who sells his raisin buns with an inadequate raisin-to-flour ratio, *see* 21 U.S.C. §§ 331, 333, 341, 343(g) & 21 C.F.R. § 136.160(a)(1),[14] or the fromager who unevenly distributes spices throughout her spiced cheeses, *see* 21 U.S.C. §§ 333, 343 and 21 C.F.R. § 133.190(a)(3).[15]

One might be inclined to call these regulatory food crimes "pure applesauce," *King v. Burwell*, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting)—but be careful: canned applesauce with the apple core left in is a federal crime, too. *See* 21 U.S.C. §§ 331, 333, 343 and 21 C.F.R. § 145.110(a)(1).[16]

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[12] @CrimeADay, Twitter (Feb. 10, 2018), https://twitter.com/CrimeADay/status/962517407456784384.

[13] @CrimeADay, Twitter (Oct. 14, 2017), https://twitter.com/CrimeADay/status/919369010030006272.

[14] @CrimeADay, Twitter (Nov. 17, 2017), https://twitter.com/CrimeADay/status/931695361651036160.

[15] @CrimeADay, Twitter (Jul. 28, 2017), https://twitter.com/CrimeADay/status/891086266292416512.

[16] @CrimeADay, Twitter (Jul. 2, 2017), https://twitter.com/CrimeADay/status/881693280207077376.

One would hope that no prosecutor would have the poor judgment to bring charges under any of these regulations. But then, poorly-conceived criminal laws "give prosecutors too much leverage," *see Yates v. United States*, 135 S. Ct. 1074, 1100-1101 (2015) (Kagan, J., dissenting), and that leverage is tempting. One would not be surprised to see a prosecutor zealously pursue a conviction under an ill-fitting criminal statute. *See, e.g. Yates* at 1079-1080 (Ginsburg, J., announcing judgment of the Court) (describing the federal prosecution of a fisherman who faced 60 years in prison for tossing three under-sized fish back into the ocean).

3. The targeted prosecution of the Shechter Brothers shows the threat that regulatory criminalization poses to liberty

Schechter Poultry, the case most closely associated with the nondelegation doctrine, also involved a federal food regulation with criminal penalties. Unfairly nicknamed the "Sick Chickens Case," the *Schechter Poultry* opinion has been invoked by critics of judicial enforcement of the nondelegation doctrine as a cautionary tale. *Schechter Poultry* merits rehabilitating: the broader history and context of the case show the danger of delegating lawmaking to law enforcement, and the importance of meaningful judicial enforcement of the separation of powers.

Schechter Poultry involved a challenge to § 3 of the National Industrial Recovery Act ("NIRA"), which

authorized the President to create "codes of fair competition" for trades or industries, selected by the President, so long as the President determines the regulations are "in furtherance of the public interest." *Schechter Poultry*, 295 U.S. at 840.

The Act marked a rapid rise in federal regulatory lawmaking. In a single year, the federal government produced around 10,000 pages of new law, mostly regulatory, compared to the 2,735 pages of federal law created during the preceding 145 years, *combined*. *See* Amity Shlaes, The Forgotten Man 201-202 (2007) ("In twelve months, the NRA had generated more paper than the entire legislative output of the federal government since 1789").

The "Live Poultry Code," promulgated under NIRA, was among that wave of new regulations. The Live Poultry Code covered individuals involved in selling, purchasing for resale, transporting, handling, or slaughtering poultry. *Schechter Poultry*, 295 U.S. at 840. The Code regulated an array of business practices, including the maximum number of hours worked per day, the minimum pay for employees, poultry inspection requirements, record-keeping requirements, price controls, and prohibiting "unfair methods of competition," such as a ban on "straight killing," a curious term that means letting customers choose which chickens they want to purchase. *Id.* at 841-842. The Code required a customer blindly to put his hand into a chicken coop "and take the first chicken that comes to hand," "irrespective of the quality of the chicken." Shlaes at 241 (quoting from the *Schechter Poultry* oral argument).

Donald Richberg, the co-author of the Act and the director of the new National Recovery Administration, warned the Justice Department that the Act could face constitutional challenges, and so the Roosevelt Administration actively sought a "test case" to try to prove the Act's constitutionality. Shlaes at 203. Federal prosecutors eventually settled on the poultry industry to bring a test case, hoping that negative public sentiments about live chicken butchering would highlight the health benefits of the New Deal. *Id.*

At the time, minority groups dominated the purchase of live-butchered chickens in New York City: 80 percent of these chickens were sold to Jewish families, the rest to African Americans, Chinese, and Italian residents. *See* O.R. Pilat, ***Brooklyn Hens to Cackle in Duel With Scream of the Blue Eagle***, Brooklyn Daily Eagle, May 1, 1935 at 3.

The Schechter family immigrated to the U.S. from Eastern Europe. The Schechter brothers—Aaron, Alexander, Joseph, and Martin—opened a kosher slaughterhouse in Brooklyn. Shlaes at 215. They purchased live chickens, butchered them according to Jewish kosher law, and sold the kosher chickens to retailers. *Id.* at 215-216. Each day, the Schechters butchered about 600 chickens, officiated by Rabbi Hellal Girschon. *See* Pilat, ***Brooklyn Hens to Cackle in Duel With Scream of the Blue Eagle***, Brooklyn Daily Eagle, May 1, 1935 at 3.

In July 1935, the Schechter brothers were indicted on 60 counts of violating the Live Poultry Code, Shlaes

at 204. Of those, the court convicted the Schechters on 18 counts, two of which were reversed on appeal to the Second Circuit, leaving 16 counts for consideration by the Supreme Court. *Schechter Poultry*, 295 U.S. at 519-520. The convictions include (1) one count of conspiracy to violate the Live Poultry Code, (2) ten counts of "straight killing," (3) two counts of failing to follow New York City chicken-inspection regulations, (4) two counts of failing to report correctly the "range of daily prices and volume of sales," (5) one count of selling to an unlicensed chicken dealer, and (6) one count of selling an "unfit" chicken. *Id.* at 525-528.

The number of indictments and convictions may sound impressive but recall that the Schechters butchered around 600 chickens per day or 3,600 chickens per week. NRA officials investigated the Schechters for some period during the summer of 1934. The Schechters described the investigation as intrusive and extensive, not to mention extremely disruptive to the brothers' business. *See* Shlaes at 214-243 (recounting history of the investigation, prosecution, trial, and appeals). If the NRA Code Authority only investigated the Shechters for a week, then out of the 3,600 butchered chickens, federal investigators identified a mere ten times (or 0.028 percent of chickens in a week) in which the Schechters had unlawfully allowed their customers to choose for themselves which chicken to purchase.

As for the ominous-sounding criminal conviction for the sale of an "unfit" chicken, out of perhaps 3,600 butchered chickens in a week, the Code investigators

identified only ten (or 0.028 percent) they thought *might* be "unfit," or unhealthy. *Id.* at 223-224. Further investigation narrowed the number to three suspect chickens (0.0083 percent), and autopsies revealed only *one* "unfit" chicken, or 0.0028 percent of the chickens butchered in a week. *Id.* And that chicken was found "unfit" only because it was an "eggbound chicken," or a chicken with eggs lodged inside—a fact that would have been hard for the Schechters to have known. *Id.*

Calling *Shechter Poultry* the "Sick Chickens Case" is misleading: despite an extensive investigation, the agency never found a single instance where the Shechters sold a sick chicken. But this myth about the case fit with the narrative the Richberg and the DOJ hoped to cultivate in their "test case": that its regulations were necessary to protect public health. Shlaes at 203.

The Live Poultry Code regulations and the prosecution of the Schechters highlight the danger of Congress delegating away its lawmaking powers—and why the Court should enforce the nondelegation doctrine. The Live Poultry Code's extensive regulations criminalized a wide-range of private, garden-variety conduct. Not only did the Schechters face imprisonment and other quasi-criminal penalties, the regulations exposed the Schechters to an invasive, wide-ranging prosecution that nearly destroyed their family business. *Id.* at 221-223. Whatever else might be considered an "important" lawmaking subject, *see Wayman*, 23 U.S. (10 Wheat.) at 43, the choice whether to bring the federal government's weighty criminal

prosecution power to bear on private conduct is certainly "important."

The Live Poultry Code and the criminal offenses highlighted by @CrimeADay might strike different people as serious or seriously absurd. But that is beside the point. The C.F.R. is "crowded" with absurd criminal offenses, as well as criminal offenses that could be justified on sound legal and policy grounds—including the Department of Justice regulation at issue here, 28 C.F.R. § 72.3. But these regulations reflect policymaking and lawmaking by the Executive Branch, not Congress, even though "defining crimes and fixing penalties" is an exclusively legislative function. *Evans*, 333 U.S. at 486.

II. The Court Should Adopt an Originalist Nondelegation Test Rooted in the Text, Structure, and History of the Constitution's Vesting Clauses

An originalist nondelegation test would look very different from the modern intelligible principle test. A test that comports with the text, structure, and history of the Vesting Clauses would recognize that,

(1) the Constitution does not expressly authorize Congress to delegate its exclusively legislative powers to the President;

(2) the Constitution does not implicitly authorize Congress to delegate its exclusively legislative powers to the President;

(3) even if Congress can assign some discretion to the President to carry out properly-promulgated legislation, Congress cannot delegate the exclusively legislative task of regulating private conduct or making law on "important subjects," including criminalization and other major policy questions; and

(4) because the separation of powers exists to protect liberty, the tie should go to liberty in close cases.

The Court should replace the intelligible principle test with a test rooted in these principles.[17]

A. The Constitution Does Not Expressly or Implicitly Authorize Congress to Delegate Away the Exclusively Legislative Power to Regulate Private Conduct

"The Federal Government 'is acknowledged by all to be one of enumerated powers.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)). The text, history, and structure of the U.S. Constitution confirm what this Court recognized long ago: Congress cannot delegate away enumerated "powers which are strictly and exclusively legislative." *Wayman*, 23 U.S. (10 Wheat.) at 43. The first section of each of

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[17] Petitioner persuasively argues that 34 U.S.C. § 20913(d) is the rare example of a delegation that would fail even the modern intelligible principle test. Indeed, 34 U.S.C. § 20913(d) is remarkably rudderless because it lacks even the vague "general policy" direction required by *Am. Power & Light Co.*

articles I, II, and III vests a separate branch with specific, particular powers: art. I, § 1 vests Congress with "[a]ll legislative Powers"; art. II, § 1 vests the President with the "executive Power"—the power to carry the law into effect; and art. III, § 1 vests the "judicial Power"—the power to interpret the law and render judgments—in the Supreme Court and any inferior courts established by Congress.

1. The Constitution does not expressly authorize Congress to delegate its exclusively legislative powers

Art. I, § 1 includes two internal textual limitations on Congress's legislative powers: first, the legislative power is limited to enumerated powers "herein granted" in Article I. *See Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816) ("The Government . . . can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication"). And second, the Constitution vests "all" legislative powers in Congress, rather than in the other branches. The "nondelegation doctrine" stems from the combined effect of U.S. Const. art. I, § 1's two textual limitations on Congress's power. *See Mistretta* at 371 (explaining the nondelegation doctrine "derives from the Constitution's opening declaration"). The Constitution does not dole out legislative power all over the place—it lists specific powers in one section.

The powers enumerated in art. I, § 8 are varied but specific. For example, Congress has the power to tax and spend, cl. 1; the power to regulate commerce among the states and with foreign nations and Indian tribes, cl. 3; the power to establish post offices and roads, cl. 7; the power to create inferior courts, cl. 9; and the power to raise and support armies, cl. 12.

But the power to delegate legislative authority isn't among the detailed powers in art. I, § 8. The *lack* of this authority is significant, because "[t]he Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government can exercise only the powers granted to it." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534-535 (2012) (cleaned up).

Without express authority to delegate, defenders of broad delegations look to the Necessary and Proper Clause, art. I, § 8, cl. 18, to "approv[e] the modern administrative state." *INS v. Chadha*, 462 U.S. 919, 982-984 (1983). *See, e.g.*, Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 Duke L.J. 1607, 1639 (2015) (arguing the Necessary and Proper Clause gives Congress the "ability to design innovative governmental structures or regulatory measures").

But the Necessary and Proper Clause is not a free-standing grant of power. It vests Congress only with the authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers" mentioned in art. I, § 8, and "all other

Powers vested by this Constitution" in any other branch or to any officer. In other words, the Necessary and Proper Clause does not itself grant Congress any *additional* enumerated powers—it only enables Congress to pass laws to carry into execution other enumerated powers—either its own enumerated powers, or the enumerated powers of other branches or officers. *See, e.g.*, *Wayman* 23 U.S. (10 Wheat.) at 22 (describing the Process Act of 1792 as enabling the Judicial Branch to "carry into Execution" the Judiciary's own vested power to render judgment, rather than delegating to the Judiciary Congress's exclusively legislative power). *See also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1234-1235 (1994).

Whatever authority the Necessary and Proper Clause provides Congress, it is not the authority to delegate away any legislative powers that are exclusive to Congress, *see Wayman* at 43, like regulation of interstate commerce, art. I, § 8, cl. 3—the clause perhaps most often invoked by Congress in its modern, sweeping delegations to the President.

2. The Constitution does not implicitly authorize Congress to delegate its exclusively legislative powers

Nor would the founding generation have understood the Constitution as granting Congress an implicit authority to delegate away legislative power, either. *See generally* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002) (arguing

that a power, once delegated, cannot be delegated away). *See also* Philip Hamburger, *Is Administrative Law Unlawful?* 377-402 (2014) (tracing the centuries-old principle that power delegated from the people cannot be subdelegated).

This principle—that a power delegated from the people to a department of government may not then be subdelegated to another department—predates the Constitution. For example, John Locke argued that "[t]he legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the people, they, who have it cannot pass it to others." J. Locke, Second Treatise of Civil Government § 22, 71. Because the founding generation is unlikely to have understood the Constitution impliedly authorizes the delegation of exclusively legislative powers, this Court should not read an implied authority into the Constitution.

B. Congress May Not Delegate to the Executive the Authority to Establish Generally Applicable Rules Governing Private Conduct

"[T]he formulation of generally applicable rules of private conduct" is among the most well-established and historically-identifiable core legislative powers. *Ass'n of Am. R.R.*, 135 S. Ct. at 1242 (Thomas, J., concurring). *See also Bond v. United States*, 134 S. Ct. 2077, 2106 (2014) (quoting Alexander Hamilton, in Federalist No. 75, that the legislative power is the

power "to prescribe rules for the regulation of the society"). The principle that the core legislative power is the authority to establish general rules for private conduct also predates the founding. *See Ass'n of Am. R.R.*, 135 S. Ct. at 1242-1244 (Thomas, J., concurring). *See also* Philip Hamburger, *Is Administrative Law Unlawful?* 84 (2014) ("the natural dividing line between legislative and nonlegislative power was between rules that bound subjects and those that did not").

Early legislation provides evidence of the general acceptance of this principle. For example, an 1813 statute authorized the Treasury to establish regulations that "shall be binding on each [federal] assessor in the performance of" his duties. The statute did not purport to delegate to the President the authority to establish regulations to bind the private conduct of the general public. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 86 fn. b (2014). Similarly, Hamilton's own conduct as Treasury Secretary also tracks Federalist 75; although his circular to customs officers purported to interpret their obligations under federal customs statutes, he did not claim those interpretations would bind private parties. Instead, the regulations only bound customs officers, who could be fired for failure to follow his instructions. Philip Hamburger, *Is Administrative Law Unlawful?* 89-90 (2014).

C. Congress May Not Delegate to the Executive the Authority to Make Law on Important, Complex Subjects

Legislative power has also long been understood as the power to decide, at a minimum, "important subjects." *Wayman*, 23 U.S. (10 Wheat.) at 43. Yet the modern intelligible principle test flips this on its head, defending broad delegations as a "reflection of the necessities of modern legislation" to let the Executive decide how to handle important "complex economic and social problems." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). *See also Mistretta* at 372 ("Congress simply cannot do its job absent an ability to delegate power under broad general directives"). The most comprehensive contemporary defense of the modern administrative state also embraces this theory, and even claims that "the modern national administrative state is the constitutionally mandated consequence of delegation." Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 89 (2017) (arguing that sweeping delegations "are necessary given the economic, social, scientific, and technological realities of our day").

But the Constitution provides no complexity exception to the carefully-calibrated separation of powers. And it certainly does not support the alchemical theory that unconstitutional delegations of sufficient scope and duration transmute constitutional violations into constitutional obligations.

If anything, the founding generation understood and even expected that strict constitutional constraints on government power would "defeat" "good laws"—and they considered this an acceptable tradeoff for the "advantage of preventing a number of bad ones." Alexander Hamilton, Federalist No. 73. In short, the Constitution's constraints on government power were originally understood as a feature, not a bug.

And the theory that 'complex' problems justify broad policymaking delegations flouts *Wayman*. Chief Justice Marshall wrote that the more "important" the policy subject, the more separation of powers demands that Congress—and only Congress—provide the policy answer. *Wayman*, 23 U.S. (10 Wheat.) at 43 ("important subjects" must be "entirely regulated by the legislature itself").

Similar separation-of-powers concerns have animated this Court's reluctance to read "ambiguous statutory text" as congressional delegations of "enormous" and "transformative" power to the executive. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). *See also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000). Although the major questions doctrine in cases like *UARG*, *King*, and *Brown & Williamson* is a canon of statutory interpretation, it shares a common constitutional DNA with the nondelegation doctrine: at bottom, both are rooted in the Constitution's vesting of lawmaking power in Congress, not the President.

Critics of nondelegation argue that legislation properly promulgated under one of Congress's enumerated powers will, sometimes, require the President to "fill up the details" to carry out Congress's orders. *Wayman*, 23 U.S. (10 Wheat.) at 43. But whatever it might mean to let the President "fill up the details," it can't mean "let the President make important policy choices where the subject is complex." After all, only Congress can regulate "important subjects." *Id.* More likely, to "fill up the details" means to delegate some fact-finding and supervisory authority to the President. *See, e.g., Marshall Field and Co.*, 143 U.S. at 693 (suspending embargo required after President "ascertained the existence of a particular fact").

And whatever else may be considered an 'important subject' which Congress alone must decide, whether to criminalize conduct is certainly an important subject rather than a mere "detail" that can be left to the Executive to "fill up." *See Evans*, 333 U.S. at 486 (defining crimes and their punishments is a legislative task).

D. Because the Separation of Powers Exists to Protect Liberty, In Close Cases, the Tie Should Go to Liberty

"Liberty demands limits on the ability of any one branch to influence basic political decisions," and the Constitution's separation of powers imposes those limits. *Clinton v. City of New York.*, 524 U.S. 417, 450-451 (1998) (Kennedy, J., concurring) ("one branch of government ought not possess the power to shape [the

people's] destiny without a sufficient check from the other two"). Indeed, the one consistent, recurring principle in this Court's nondelegation jurisprudence is that the "ultimate purpose" of the doctrine "is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). *See also Ass'n of Am. R.R.* at 1237 (Alito, J., concurring) (the Constitution's separation of powers "exists to protect liberty"); *INS v. Chadha*, 462 U.S. 919, 950 (1983) (describing that the Framers expressed "the need to divide and disperse power in order to protect liberty").

During ratification, supporters of the proposed Constitution often invoked its separation of powers to defend against arguments the new federal government would encroach on individual liberty. For example, Convention delegate Pierce Butler wrote in a letter that "[p]ains and attention were not spared" during the Convention to "preserve to the individual as large a share of natural rights" by balancing "the powers of the three Branches, so that no one shoud [*sic*] too greatly preponderate." Pierce Butler, *Letter to Weedon Butler*, The Records of the Federal Convention of 1787, Vol. 3. Ed. Max Farrand, New Haven: Yale University Press, 1911. In Federalist No. 47, James Madison, quoting Baron de Montesquieu, warned that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." For that reason, the "enlightened patrons of liberty" regard "[n]o political truth" as "of greater intrinsic value than the separation of powers. And in Federalist No. 51, Madison argued that "separate and distinct exercise of

the different powers of government" is "admitted on all hands to be essential to the preservation of liberty."

The many statements by the founding generation and this Court that the separation of powers is essential to protect individual liberty suggest that when courts are weighing nondelegation challenges, they should consider what effect a delegation would have on liberty. And in close cases, the tie should go to liberty.

* * *

To decide this case, the Court need not stray from its description in *Wayman* of the Federal Government's structure created by the Vesting Clauses—a description which has not been improved upon in the subsequent 193 years: "the legislature makes, the executive executes, and the judiciary construes the law." *Wayman*, 23 U.S. (10 Wheat.) at 46. The President may not make law—and prosecutors may not create crimes.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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